Loomis Armored US, Inc. *and* Teamsters Local Union No. 439 International Brotherhood of Teamsters, Change To Win Coalition; Teamsters Local Union No. 315, International Brotherhood of Teamsters, Change To Win Coalition; and Teamsters Local Union 853, International Brotherhood of Teamsters, Change To Win Coalition

Loomis Armored US, Inc. *and* Teamsters Local 150, International Brotherhood of Teamsters, Change To Win Coalition

Loomis Armored US, Inc. *and* Teamsters, Chauffeurs, Warehousemen and Helpers, Local No. 542, International Brotherhood of Teamsters

Loomis Armored US, Inc. *and* Package and General Utility Drivers, Local 396, International Brotherhood of Teamsters. Case 32–CA–025316**,** 32–CA–025708, 32–CA–025709, and 32–CA–025727

June 9, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA, HIROZAWA, AND MCFERRAN

Under Section 8(a)(5) of the National Labor Relations Act, an employer has a duty to bargain with the majority representative of its employees, whether certified by the Board following an election or voluntarily recognized by the employer. Section 9(b)(3) of the Act, however, prohibits the Board from certifying a "mixed-guard union" as the collective-bargaining representative of a unit of guards.[1] Today we revisit the question whether an employer of security guards, having voluntarily recognized a "mixed-guard union" as its guards' representative, lawfully may withdraw recognition if no collective-bargaining agreement is in place, even without an actual loss of majority support for the union.[2] In *Wells Fargo Corp.*, 270 NLRB 787 (1984), rev. denied sub nom. *Truck Drivers Local 807 v. NLRB*, 755 F.2d 5 (2d Cir. 1985), cert denied 474 U.S. 901 (1985), a divided Board held that the employer was free to withdraw recognition in such circumstances. But *Wells Fargo* has been the object of continued criticism, including from the federal appellate courts. In this context, the General Counsel and the Charging Party Unions urge us to overrule *Wells Fargo* and hold, instead, that an employer violates Section 8(a)(5) and (1) by withdrawing recognition in the circumstances described. We find merit in their arguments.

I.

Each Charging Party is a local union affiliated with the International Brotherhood of Teamsters. Each had a collective-bargaining agreement with the Respondent covering a unit of security guards in, respectively, Stockton, Richmond, Milpitas, Sacramento, San Diego, and Los Angeles, California. The duration of these bargaining relationships ranged from 10 to 47 years. In each instance, the Respondent had voluntarily recognized the local union notwithstanding that the local union was a mixed-guard union.

In the summer of 2010,[3] the Respondent withdrew recognition from Local 439, Local 315, and Local 853 at its Stockton, Richmond, and Milpitas, California locations, respectively, in each case to be effective upon expiration of the applicable collective-bargaining agreement. Over the next several months, the Respondent withdrew recognition from Local 150, Local 396, and Local 542 at the Sacramento, San Diego, and Los Angeles locations, respectively. At each location, the Respondent refused to bargain further with the Union. At none of those locations, however, did the Respondent assert that the Union had lost majority support among the unit employees. The Respondent's only stated basis for withdrawing recognition was that Section 9(b)(3) of the Act, as interpreted by the *Wells Fargo* Board, permitted it to do so.

II.

The General Counsel and the Charging Party Unions, with support from amicus SEIU, take the position that the Respondent's withdrawals of recognition were unlawful. In their view, once an employer has voluntarily recognized a mixed-guard union for a unit of guards, the employer's bargaining obligation should continue until the union is shown to have lost majority support in the

[1] "[N]o labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards." Sec. 9(b)(3), 29 U.S.C. §159(b)(3). A "mixed-guard union" is a union that either admits both guards and non-guards to membership, or is affiliated with a union that does so. Id.

[2] On January 11, 2012, Administrative Law Judge Jay R. Pollack issued the attached decision. The General Counsel and the Charging Parties filed exceptions and supporting briefs, and the Respondent filed answering briefs. The Service Employees International Union (SEIU) filed an amicus brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

[3] All dates are in 2010.

unit. They contend that this position accords with established precedent concerning all other bargaining relationships established pursuant to Section 9 of the Act; that this position is consistent with Section 9(b)(3), which, in relevant part, bars the Board only from certifying a mixed-guard union as the representative of a guards unit; and that this position finds support in the decision of a federal court of appeals, in the dissenting opinion of one federal court of appeals judge, and in the dissenting opinions of several Board Members.[4]

The Respondent contends that the majority in *Wells Fargo* correctly interpreted Section 9(b)(3) to permit an employer of guards to withdraw recognition from a mixed-guard union in the absence of a collective-bargaining agreement. The Respondent emphasizes that *Wells Fargo* was affirmed by the United States Court of Appeals for the Second Circuit, and that the Board later twice reaffirmed *Wells Fargo*.[5] Thus, in the Respondent's view, it was "absolutely privileged" to withdraw recognition from the Charging Party Unions when it did.

III.

Presented with the parties' respective positions, and mindful of the Board's obligation to continually evaluate whether its decisions and rules are serving the Act's purposes, we have conducted a thorough review of the statutory language, its legislative history, and applicable Board and judicial precedent. We have concluded that the *Wells Fargo* Board's interpretation of Section 9(b)(3), even if a permissible reading of the statute, is not compelled by the statute. Moreover, we are persuaded that this interpretation unnecessarily sacrifices one of the Act's primary objectives—the promotion of stability of established collective-bargaining relationships—based on an expansive reading of Section 9(b)(3)'s prohibition on the Board certifying a mixed-guard union as the representative of a guards unit. Considering the principle that exceptions to the Act's protections should be construed narrowly, we find that *Wells Fargo* created an unwarranted exception to the general rule that an employer, having voluntarily recognized a majority-supported union, must continue to recognize and bargain with the union unless and until the union is shown to have actually lost majority support. Accordingly, we have decided to abandon the rule adopted in *Wells Fargo*.

In its place, we adopt the rule proposed by the General Counsel and the Charging Parties: that an employer of guards, like other employers, remains bound by the collective-bargaining relationship into which it voluntarily entered unless and until the union is shown to have actually lost majority support among unit employees. Absent such a showing, we will find that the employer's withdrawal of recognition from the union is an unlawful refusal to bargain under Section 8(a)(5) and (1) of the Act. In our view, this rule is more consistent with the statutory language and better serves the purposes of the Act.

We recognize, however, that *Wells Fargo* provided the controlling rule for over 30 years and employers have relied on it to assess whether it was lawful to withdraw recognition. For that reason, we will not apply our holding retroactively to those employers who withdrew recognition from a mixed-guard union prior to the date of this decision.

A.

Before analyzing the parties' competing positions, we briefly review the *Wells Fargo* decision and its subsequent treatment by the Board and the courts. The rationale of *Wells Fargo* begins with the undisputed point that Congress designed Section 9(b)(3) to shield employers from being required to recognize and bargain with a union in circumstances where there was a potential conflict of loyalties involving guard employees.[6] An employer's guards may be called upon to protect or enforce the employer's property rights against nonguard fellow union members engaged in protected activity against the employer. The *Wells Fargo* majority opined that this conflict exists whether or not a mixed-guard union is certified by the Board. Proceeding from that premise, the majority reasoned that, where an employer has withdrawn recognition from a mixed-guard union, the Board cannot order the employer to resume recognizing and bargaining with the union because such an order would "give[] the [u]nion indirectly—by a bargaining order—what it could not obtain directly—by certification—i.e., it compels the [employer] to bargain with the [u]nion."[7] The majority thus concluded that "there is no basis for the Board's drawing a distinction between initial certification and, as here, the compulsory maintenance of a bargaining relationship through the use of a bargaining order" because "[i]n either case, saddling the employer with an obligation to bargain presents it with the same set

[4] See *General Services Employees, Local 73 v. NLRB*, 230 F.3d 909 (7th Cir. 2000), granting petition for review in *Temple Security*, 328 NLRB 663 (1999) ("*Temple* I"). Members Fox and Liebman had dissented in *Temple* I. Earlier, Member Zimmerman had dissented in *Wells Fargo*, supra, and Circuit Judge Mansfield in turn dissented from the Second Circuit's denial of review in that case. Most recently, Member Liebman dissented in *Northwest Protective Service, Inc.,* 342 NLRB 1201 (2004), where the Board majority applied the *Wells Fargo* rule.

[5] See *Temple I* and *Northwest Protective Service*, above.

[6] See *Wells Fargo*, above, 270 NLRB at 789.

[7] Id. at 787.

of difficulties and the same potential conflict of loyalties that Section 9(b)(3) was designed to avoid."[8] Accordingly, the majority held that an employer of guards could lawfully withdraw recognition from the union upon contract expiration, regardless of the origin of the bargaining relationship and the union's ongoing majority status.

Dissenting, Member Zimmerman emphasized that Section 9(b)(3) prohibits the Board only from certifying a mixed-guard union and that, where an employer instead has voluntarily recognized a mixed-guard union, nothing in Section 9(b)(3) bars the Board from requiring the employer to honor its own commitment. As he explained, the Board, in ordering the employer to resume recognizing and bargaining with the union, "would not thereby be *establishing* the bargaining obligation. The [employer] itself did that. Our Order more fairly would be characterized as one compelling [the employer] to *maintain* the relationship it, not we, created."[9] For that reason, Member Zimmerman argued that a remedial order to bargain would not be analogous to a Board certification prohibited by Section 9(b)(3).

Member Zimmerman also pointed out that "nothing in [the legislative history of Section 9(b)(3)] supports the view that when Congress wrote the Board should not certify mixed unions it meant to deprive them of not only certification, but also long-established rights flowing from voluntary recognition."[10] He observed that "when Congress wished to disqualify a union not only from certification but, more broadly, from resort to the Board for the protection of existing bargaining relationships, Congress well knew how to achieve that end."[11] This was demonstrated, Member Zimmerman observed, by three other subsections of the Taft-Hartley Act—then Section 9(f), (g), and (h) of the Act—which not only disqualified unions from having their petitions processed in specified circumstances, but further provided that charges filed by those disqualified unions could not be the basis for an unfair labor practice complaint.[12] Finally, he observed that the majority holding essentially equated Section 9(b)(3) with Section 8(f) and Section 14(a), which respectively establish, in far more explicit terms, exceptions to the Act's continuing recognition requirements with respect to supervisors and construction industry employees.[13] For all of those reasons, Member Zimmerman concluded that the Act's underlying goal of protecting stable bargaining relationships required that the restrictions in Section 9(b)(3) be limited to their express terms.

As indicated, *Wells Fargo* has received decidedly mixed reviews. To be sure, as the Respondent emphasizes, the Second Circuit affirmed *Wells Fargo*, albeit in a divided decision.[14] But the *Wells Fargo* rationale proved unpersuasive to the Seventh Circuit, which concluded that the plain language of the Act does not permit this reading. The Seventh Circuit emphasized that the *Wells Fargo* exception to the rule that an employer remains bound by a voluntary recognition agreement until the union loses majority support "is simply not part of the Act's plain text."[15] The court also found, in agreement with other courts, that in view of Section 9's detailed prescription of the Board certification process and the particular advantages enjoyed by certified unions, "Section 9(b)(3) is a limitation not upon employee rights (such as those found in Secs. 7 and 8 of the Act) but upon Board powers."[16] Accordingly, the court concluded, "voluntarily recognized unions and the employees represented by them are still protected by 8(a)(5)'s duty to bargain," and "[t]o qualify for Section 7 and Section 8 protections, a union must simply be a 'representative of the employees,'" whether certified or voluntarily recognized.[17] Last, the court pointed out that, contrary to the *Wells Fargo* majority's equation of recognition with certification, a certified union enjoys specific advantages under the Act which are not available to noncertified unions.[18]

[8] Id. at 789.
[9] Id. at 791 (emphasis in original).
[10] Id. at 791.
[11] Id.
[12] Id.
[13] Id. at 790 fn.1.

[14] *Truck Drivers Local 807,* above. The Second Circuit stated that "[t]he fact that Congress expressly precluded the Board from certifying a mixed-guard union as the representative of a unit of guards . . . is certainly evidence that Congress disfavored such relationships" and "it is reasonable to infer from the statutory language and the decisions under it that the preclusion of certification portends more than merely a simple check on the Board's power to certify the results of an election." 755 F.2d at 9–10. As explained below, we respectfully conclude that the Act does not compel the Board to draw the inferences endorsed by the Second Circuit and that there are sound reasons not to do so.

[15] *General Service Employees Local 73*, above, 230 F.3d at 914. The Seventh Circuit analyzed *Wells Fargo* under the framework of *Chevron, USA v. Natural Resources Defense Council*, 467 U.S. 837 (1984), which established the standard for judicial review of federal agency decisions. As the court noted, under *Chevron* a court must first determine whether Congress has "directly spoken to the precise question at issue." 230 F.3d at 912. If Congress has done so, "the court must give effect to the unambiguously expressed intent of Congress." Id. If Congress has not specifically addressed the question, the court "must respect the agency's construction of the statute so long as it is permissible." Id. The court found that the "plain text" of Secs. 8 and 9 foreclosed the *Wells Fargo* holding and so declined to defer to the Board's construction of the Act. Id. at 914–915.

[16] Id. at 914–915, quoting *NLRB v. White Superior Division*, 404 F.2d 1100, 1103 fn. 5 (6th Cir.1968), and *NLRB v. Bel–Air Mart, Inc.*, 497 F.2d 322, 327 (4th Cir.1974).

[17] *General Service Employees Local 73*, 230 F.3d at 915.

[18] Id. Those advantages include Sec. 9(c)(3)'s 1-year nonrebuttable

The Board's jurisprudence under *Wells Fargo* has done nothing to resolve this tension. Board majorities reaffirmed *Wells Fargo* in one case (*Temple I*, above) and followed it in another (*Northwest Protective Service*, above). In each of those cases, however, there was a dissent along the lines of Member Zimmerman's dissent in *Wells Fargo*—but no attempt by the majority to strengthen the *Wells Fargo* rationale. As a result, the *Wells Fargo* rationale remained as it was: that the Board cannot find unlawful an employer's withdrawal of recognition from a mixed-guard union because doing so would "give[] the [u]nion indirectly—by a bargaining order—what it could not obtain directly—by certification—i.e., it compels the [employer] to bargain with the [u]nion."[19]

B.

Against this backdrop, our analysis of the issue presented begins, as it must, with the statute. Section 9(b) of the Act empowers the Board to determine appropriate units for collective bargaining, subject to several targeted provisos. One of those provisos, set forth in Section 9(b)(3), imposes two specific limitations on the Board's authority relative to units of guards. The proviso's first clause, not at issue here, states that the Board "shall not decide that any unit is appropriate . . . if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises."[20] The proviso's second clause, the one relevant to this case, states that "no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards."[21] As noted above, these clauses reflect Congress' concern over the potential conflict of loyalties presented when an employer's guards are asked to discharge their duties with respect to nonguard employees represented by the same union.

But, as Member Zimmerman dissenting in *Wells Fargo* and the Seventh Circuit in *General Service Employees* stated, Section 9(b)(3) also embodies Congress' chosen method for addressing that potential conflict: it prevents the Board from *certifying* a mixed-guard union as the representative of a guards unit. Section 9(b)(3) does not, however, expressly limit an employer's discretion to voluntarily recognize a mixed-guard union as the representative of a guards unit, and Board precedent makes clear that an employer is permitted to do so.[22] An employer of guards thus may conclude that the potential conflict that concerned Congress either is not present or is outweighed by the potential advantages of entering into a collective-bargaining relationship with a mixed-guard union. And, in fact, a significant number of employers have availed themselves of this option.[23]

Section 9(b)(3) does not speak to the termination of collective-bargaining relationships between employers and mixed-guard unions. In particular, as the *Wells Fargo* Board conceded, Section 9(b)(3) does not expressly address the situation where an employer has voluntarily recognized a mixed-guard union for a unit of guards, but then seeks to withdraw recognition from that union. See 270 NLRB at 789. Thus, the statutory language permits the rule advanced by the General Counsel and the Charging Parties, which would preclude the employer from withdrawing recognition from a voluntarily-recognized, mixed-guard union that still enjoyed majority support – just as would be the case with respect to other, voluntarily-recognized unions. We nevertheless find it appropriate, as did the *Wells Fargo* Board, to look beyond the statutory language to consider the Act's legislative history and underlying purposes.[24]

We begin with former Member Zimmerman's observation in *Wells Fargo*, also expressed by dissenting Circuit Judge Mansfield in *Truck Drivers Local 807*,[25] that Congress, when drafting Section 9(b)(3), knew how to exclude employees and unions from the Act's protection, and clearly did so with respect to groups other than guards and mixed-guard unions.[26] Thus, Congress could have drafted Section 9(b)(3) to deprive mixed-guard unions of protection under some or all provisions of the

presumption of majority status; 8(b)(4)(C)'s prohibition against recognitional picketing by rival unions; 8(b)(4)(D)'s exception to restrictions on coercive action to protect work jurisdiction; and 8(b)(7)'s exception from restrictions on recognitional and organizational picketing. See also *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 599 fn.14 (1969) (noting the same advantages of certification).

[19] *Wells Fargo*, above, 270 at 787.

[20] 29 U.S.C. § 159(b)(3).

[21] Id.

[22] See, e.g., *Northwest Protective Service*, above, 342 NLRB at 1202–1203; *Amoco Oil Co.*, 221 NLRB 1104 (1975); *William J. Burns Detective Agency*, 134 NLRB 451 (1961).

[23] SEIU, a mixed-guard union, states in its amicus brief that it alone currently represents 35,000 private security guards along with its other members.

[24] Given our disposition of this case, we find it unnecessary to adopt the Seventh Circuit's conclusion in *General Service Employees Local 73 v. NLRB*, above, that Sec. 9(b)(3) does not permit the majority holding in *Wells Fargo*.

[25] *Truck Drivers Local 807 v. NLRB*, above, 775 F.2d at 15.

[26] See, e.g., Sec. 2(3), which defines an "employee" protected under the Act, and also excludes specific categories of workers from the Act's protection.

Act, including Section 8(a)(5).[27] But Congress did not choose that path. That legislative decision, in our view, further counsels against reading Section 9(b)(3) broadly. We are guided, in turn, by the Supreme Court's observation that "administrators and reviewing courts must take care to assure that exemptions from NLRA coverage are not so expansively interpreted as to deny protection to workers the Act was designed to reach."[28] That approach favors finding, contrary to *Wells Fargo*, that Section 9(b)(3) does *not* require the Board to deny a voluntarily recognized mixed-guard union the protections afforded all other unions under Section 8(a)(5) of the Act.

This narrower reading of Section 9(b)(3), moreover, is consistent with the relevant legislative history, as previously asserted by Member Zimmerman and Circuit Judge Mansfield's dissent in *Truck Drivers Local 807*, above. The provisos to Section 9(b)(3) were a negotiated compromise between those favoring complete exclusion and those favoring complete inclusion of guards under the Act's protection. The summary of the differences between the conference bill finally enacted as the Taft-Hartley Act and the earlier Senate bill stated that "guards still retain their rights as employees under the [Act]," notwithstanding the terms of Section 9(b)(3).[29] Guards, however, lose an important aspect of the Act's protection if their employer is permitted to walk away from its voluntary recognition agreement whenever a contract has expired.

Finally, we find that policy interests strongly favor abandoning *Wells Fargo* and adopting instead the General Counsel's and the Charging Parties' proposed interpretation of Section 9(b)(3). As discussed, Section 9(b)(3) was prompted by a desire to shield employers from being required to enter into collective-bargaining relationships covering units where guards might face a conflict of loyalties. But we are not persuaded that this statutory purpose is compromised or defeated when the Board simply applies the otherwise universal rules of collective bargaining to a collective-bargaining relationship voluntarily entered into by the employer itself. The fundamental purpose of the 9(b)(3) prohibition of Board certification of mixed-guard unions in guard units, in our view, is to permit employers to decide for themselves whether to recognize and bargain with such unions.[30]

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[27] Notably, within Sec. 9(b)(3), the clause immediately preceding the bar on certifying mixed-guard unions categorically declares that the Board may not find appropriate for any purpose bargaining units comprising guards and nonguards. It did not provide that units of guards alone are inappropriate. As the Board observed long before *Wells Fargo*, this distinction bears careful note. A unit containing both guard and nonguard employees is inappropriate for any purpose. Conversely, a unit composed exclusively of guard employees is appropriate. The *only* limitation in the latter instance is that the labor organization representing such employees cannot be 'certified' if in other aspects of its operation it admits nonguard employees to membership or is affiliated directly or indirectly with an organization which does so.

William J. Burns Detective Agency, above, 134 NLRB at 452 (emphasis added).

Similarly, Sec. 14(a) explicitly deprives supervisors of the Act's protection, even when they are members of a labor organization covered by the Act. See also General Service Employees, Local 73, supra, 230 F.3d at 913 ("Sec. 9(b)(3) looks nothing like Sec. 8(a)(2) . . . which absolutely forbids employer-dominated unions").

Last, as Member Zimmerman observed, Sec. 8(f) of the Act permits a construction-industry employer to recognize a union without a showing of majority support, but also to withdraw that recognition at the expiration of any collective-bargaining agreement between the parties. *John Deklewa & Sons,* 282 NLRB 1375 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1987), cert. denied 488 U.S. 889 (1988). Significantly, Sec. 8(f) permits such withdrawals only because 8(f) unions lack majority status. *Deklewa,* 282 NLRB at 1386–1387.

[28] *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 399 (1996). In *Holly Farms*, the Court deferred to the Board's interpretation of the Act's exclusion of "agricultural laborer[s]" from its definition of "employee," NLRA § 2(3), 29 U.S.C. § 152(3), and its finding that certain workers were statutory employees, not exempt agricultural laborers. Reviewing the relevant legislative history, the Court observed that Congress "intended to cabin the exemption," rejecting in conference committee a broader definition of "agricultural laborer" and substituting a narrower one. *Holly Farms*, 517 U.S. at 399 fn. 6.

[29] 93 Cong.Rec. 6601 (1947), reprinted in 2 NLRB, Legislative History of the Labor Management Relations Act, 1947, at 1541 (1948). Like the Respondent, the Board majority in *Wells Fargo* and the Second Circuit majority in *Truck Drivers Local 807* relied on a floor comment by Senator Taft, the chief sponsor of the Taft-Hartley Act, that guards, as a result of a House-Senate compromise, would "have the protection of the Wagner Act only if they had a union separate and apart from the union of the general employees." 270 NLRB at 788–789; 755 F.2d at 8–9; 93 Cong.Rec. 6603 (1947), reprinted in 2 NLRB, Legislative History of the Labor Management Relations Act, 1947, at 1544 (1948). Senator Taft later refined this comment, however, by stating that "[w]e compromised with the House by providing that [guards] should have the protection of the Wagner Act, but in a separate *unit* from the workers in the plants." 93 Cong.Rec. 6658 (1947), reprinted in 2 NLRB, Legislative History of the Labor Management Relations Act, 1947, at 1572 (1948) (emphasis added). As explained by Circuit Judge Mansfield in *Truck Drivers Local 807*, Senator Taft's first statement, read in the context of the conference report and his later floor statement, did not denote any limitation on a mixed-guard union's representational rights apart from 9(b)(3)'s restrictions on unit composition and certification. 755 F.2d at 14 fn. 2. In any case, "[t]he remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history." *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979).

[30] "Section 9(b)(3) is grounded in a concern about the protection of certain property rights of an employer, and that concern is not undermined when the employer voluntarily waives its 9(b)(3) rights and recognizes a guard/nonguard union for a unit of guards." *Stay Security*, 311 NLRB 252, 252 (1993).

As the General Counsel points out, none of the respondents in *Wells Fargo, Temple I*, or *Northwest Protective Service* asserted any existing or prospective conflict of loyalties as the basis for its withdrawal of recognition. Likewise, the Respondent has stipulated that it withdrew recognition from each of the Charging Party Unions "based on Board precedent that permits withdrawal of recognition of a [mixed-guard

Our reading of the proviso clearly permits and effectuates this choice.

The Board's issuance of a remedial order to bargain does no more than restore the status quo that the employer, not the Board, created. And, importantly, that status quo is voluntary recognition, not certification. Thus, as critics of *Wells Fargo* have argued, the *Wells Fargo* Board's assertion that "there is no basis for the Board's drawing a distinction between initial certification and, as here, the compulsory maintenance of a bargaining relationship through the use of a bargaining order" is erroneous. Although it certainly is true that the employer will be required to bargain with the mixed-guard union, it also is true, as described, that the relationship remains grounded in the employer's own decision to voluntarily recognize the union, not in a Board certification with its attendant benefits. The Board's issuance of a bargaining order therefore remains consistent with the language of Section 9(b)(3) and its underlying purpose of barring the Board from requiring an employer to enter into a bargaining relationship with a mixed-guard union.

At the same time, finding an employer's unsupported withdrawal of recognition from a mixed-guard union unlawful, and restoring the status quo, better serves the Act's fundamental policy of fostering stable labor-management relationships, including those established through voluntary recognition.[31] The weight accorded that policy is demonstrated by the fact that, in other settings where an employer has independently recognized a union having majority support, the union is not later deprived of its bargaining rights even where the initial recognition *actually* contravened the Act's requirements. For example, in *International Telephone & Telegraph Corp.*, 159 NLRB 1757 (1966), enfd. in relevant part 382 F.2d 366 (3d Cir. 1967), cert. denied 389 U.S. 1039 (1968), a full Board held that the failure to hold a separate vote for professional employees in a mixed unit of professionals and nonprofessionals, in violation of Section 9(b)(1), did not invalidate the parties' subsequent years-long consensual acceptance of the unit. Consequently, the employer could not unilaterally withdraw recognition after granting it voluntarily, even from a unit whose initial establishment violated the Act.[32] Given that it does *not* violate the express terms of the Act for an employer to voluntarily recognize a mixed-guard union, the Board's policy favoring stable bargaining relationships should prevail in this context. Construing Section 9(b)(3) to permit an employer to withdraw from a stable collective-bargaining relationship with a mixed-guard union would undermine a central purpose of the Act.

But that is exactly what the *Wells Fargo* rule countenances. This is particularly concerning because collective-bargaining relationships created through voluntary recognition agreements have become increasingly common since *Wells Fargo* was decided.[33] More specifically, there has been increasing organizing activity in the security industry in recent years.[34] As such, *Wells Fargo* risks depriving increasing numbers of employees of their Section 7 right to representation by unions that they, with their employers' acceptance, have selected as their collective-bargaining representatives. The better approach, in our view, is to afford the same protection of Section 7 rights to those employees as to all other employees who have chosen lawful representation.[35]

union] upon the expiration of the relevant collective-bargaining agreement."

[31] See, e.g., *Lamons Gasket Co.*, 357 NLRB 739 (2011).

[32] The *Wells Fargo* majority attempted to distinguish *International Telephone* on the ground that the estoppel theory it applied "does not operate to preclude the intended beneficiary of the statute from asserting rights thereunder." 270 NLRB at 790. But even accepting the "intended beneficiary" theory, it would not permit the assertion of a right the statute does not create. In any event, even assuming that an employer withdrawing recognition is an "intended beneficiary" of Sec. 9(b)(3), we find the *International Telephone* Board's following observation regarding Sec. 9(b)(1) equally applicable here: "Congress could not have intended the 9(b)(1) requirement to be applied in such a manner as to provide a shield behind which one party, after having benefited from the bargaining relationship for so many years, may with impunity . . . seek to shatter the bargaining structure it has itself joined to create." 159 NLRB at 1764 fn. 15; see also *Mine Workers v. Arkansas Oak Flooring Co.*, 351 U.S. 62 (1956), cited by Member Zimmerman in *Wells Fargo*, 270 NLRB at 791, and by the dissent in *Truck Drivers Local 807*, above, 755 F.2d at 12. In *Arkansas Oak Flooring*, the Court noted that the union, having failed to comply with the subsections of Sec. 9 that then required it to file non-Communist affidavits and detailed financial and internal information with the Department of Labor, could not seek enforcement of its rights before the Board. 351 U.S. at 69–70 fn. 4. Nevertheless, the Court found, that failure did not deprive the union of its representational status or its right to picket for recognition. Id. at 71–75. "Subsecs. (f), (g), and (h) of Sec. 9 merely describe advantages that may be gained by compliance with their conditions. The very specificity of the advantages to be gained and the express provision for the loss of these advantages imply that no consequences other than those so listed shall result from noncompliance." Id. at 73.

[33] *Lamons Gasket Co.*, 357 NLRB at 742; *Dana Corp.*, 341 NLRB 1283, 1284 (2004); B. Sachs, "Labor Law Renewal," 1 Harv. L. & Pol'y Rev. 375, 378–382 (2007); J. Brudney, "Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms," 90 Iowa L. Rev. 819, 821–831 (2005).

[34] The Board's internal case records show that organizing activity by more than 60 unions solely representing guards (and therefore eligible for Board certification) has increased from an annual average of 20 Board petitions filed from 2002 to 2006, to an annual average of 144 petitions filed from 2007 to 2015. Moreover, the assertion by SEIU, a mixed-guard union, that it alone now represents 35,000 guards suggests that this increase in activity is not limited to guards-only unions.

[35] The Respondent argues that our decision may deter employers from voluntarily recognizing mixed-guard unions, because they will no longer have the option to withdraw recognition later (assuming the union retains majority support). But holding employers of guards to their voluntary recognition agreements does no more than place them

We have carefully considered the view of our dissenting colleague, who acknowledges that the Act does not compel a particular result in this case. We have explained why the approach adopted here—from among the statutorily-permissible alternatives identified by our colleague—is superior. In our view, the approach favored by our colleague gives too little weight to preserving stability in collective bargaining. In all other analogous contexts, as noted, an employer is required to honor its voluntary recognition of a union so long as the union retains majority support. In this respect, Section 8(f), cited by our colleague, is inapt, for reasons we have noted already.[36]

For all of the foregoing reasons, we hold that once an employer voluntarily recognizes a mixed-guard union as the representative of a unit of guards, the employer must continue to recognize and bargain with the union unless and until it is shown that the union actually has lost majority support among unit employees. Absent that showing, we will find that the employer's unilateral withdrawal of recognition from the union violates Section 8(a)(5) and (1) of the Act. As explained, we find that this rule is consistent with both the text of Section 9(b)(3) and its legislative history, and that it better serves the policies underlying both that section and the Act as a whole. To the extent that *Wells Fargo* is inconsistent with this holding, it is overruled.

IV.

The remaining question is whether we should apply our holding to the present case. The Board's usual practice is to apply all new policies and standards to all pending cases in whatever stage. However, we apply new rules and other changes prospectively where retroactive application would cause "manifest injustice."[37] In determining whether retroactive application will cause manifest injustice, the Board considers the reliance of the parties on preexisting law, the effect of retroactivity on accomplishment of the purposes of the Act, and any particular injustice arising from retroactive application.[38]

In *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001), the Board changed the general rule governing an employer's withdrawal of recognition of an incumbent union, overruling *Celanese Corp.*, 95 NLRB 664 (1951), the controlling authority for nearly 50 years. The Board acknowledged that its "usual practice is to apply all new policies and standards to 'all pending cases in whatever stage,'" but found that the "ill effects" that retroactivity would produce in that case outweighed the usual considerations favoring it. 333 NLRB at 729 (citations omitted):

> *Celanese* was the law for nearly half a century. Employers clearly relied upon it in assessing whether it was lawful to withdraw recognition. That standard was significantly more lenient than the one we have announced in this decision. . . . Employers who withdrew recognition in reliance on *Celanese* and thereafter unilaterally changed the terms and conditions of employment for unit employees could be liable for significant amounts of make-whole relief if we were to apply our new standard in pending cases.

Id. (fn. omitted). "Therefore," the Board concluded, "we shall decide all pending cases involving withdrawals of recognition under existing law." Id.

Here, as in *Levitz*, employers, including the Respondent, have relied on decades-old precedent in deciding whether to withdraw recognition and they could face costly liability were we to apply our decision retroactively. Therefore, we will follow the Board's approach in *Levitz* and decide this case and other pending cases under *Wells Fargo*. Accordingly, we will dismiss the complaint in this case.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. June 9, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting.

Section 9(b)(3), the statutory provision at issue in this case, was enacted to address conflicts that might arise when guards that enforce employers' rules and protect

on the same footing as other employers with respect to such agreements, save for construction-industry employers. There is no evidence that foreclosing employers from withdrawing voluntary recognition at their discretion has deterred initial recognition.

[36] See fn. 27, supra.

[37] See, e.g., *SNE Enterprises*, 344 NLRB 673, 673 (2005).

[38] Id.

their property are represented by the same union as nonguard employees. In my view, Section 9(b)(3) is open to several reasonable interpretations. One of those interpretations is the one adopted by the Board in *Wells Fargo Corp.*,[1] which for more than 30 years has been the prevailing interpretation of Section 9(b)(3). Unlike my colleagues in the majority, I would adhere to *Wells Fargo*. *Wells Fargo* reflects a reasonable middle position between less persuasive interpretations, and it is most consistent with the compromise that Congress struck when it restricted the representation of guards by mixed guard/nonguard unions. Moreover, I believe no compelling reasons warrant the reconsideration of *Wells Fargo*. Therefore, I respectfully dissent from the majority's decision to overrule *Wells Fargo*, and applying *Wells Fargo*, I would dismiss the complaint.

Discussion

Section 9(b)(3) was added to the Act as part of the Taft-Hartley amendments adopted in 1947. Section 9(b)(3) states:

> [T]he Board shall not . . . decide that any unit is appropriate . . . if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.[2]

This much about Section 9(b)(3) is clear: it imposes both a "unit" restriction (the Board cannot decide that any bargaining unit will include guards and nonguards) *and* a "union membership" restriction (the Board cannot certify a labor organization as the representative of a unit of guards if it admits to membership—or is affiliated with an organization that admits to membership—"employees other than guards"). This case involves the "union membership" restriction, which may be interpreted in at least three ways.

1. The "Never Represent" Interpretation. One view is that Congress intended that a mixed guard/nonguard union should never represent guards. This would mean the Board cannot certify a guard/nonguard union (following an election where guards have voted to be represented by a mixed guard/nonguard union), nor can an employer voluntarily recognize and bargain with such a union as the representative of a unit of guards.

2. *The "Voluntary Relationship" Interpretation*. Under this view, a mixed guard/nonguard union cannot be certified by the NLRB as the representative of a guards unit, but an employer can *voluntarily* recognize a guard/nonguard union as the representative of a guards unit, and the parties may enter into a collective-bargaining agreement. Consistent with the voluntary nature of the relationship, however, when the labor contract ends, each party retains the right to discontinue the relationship. Also, the guard/nonguard union cannot strike or exert other economic coercion to require the employer to continue the relationship.

3. *The "Voluntary Recognition/Conversion" Interpretation*. At the front end, this view is identical to interpretation 2: a mixed guard/nonguard union cannot be certified by the NLRB to represent a guards unit, but an employer can voluntarily recognize a guard/nonguard union to represent a guards unit. However, once the union receives voluntary recognition, the fact that it is a mixed guard/nonguard union essentially becomes irrelevant for purposes of the Act. In other words, as soon as an employer voluntarily recognizes a guard/nonguard union, the representation converts into what would exist if the union did *not* admit nonguards to membership. Based on this conversion, both parties are required to continue their bargaining relationship after their collective-bargaining agreement expires (unless and until the union loses majority support), and the guard/nonguard union can engage in strikes and wield other economic weapons just like any other union.

Each of these interpretations is reasonable and finds support in the Act and sound labor policy. Unfortunately, each interpretation is also potentially at odds with the language of Section 9(b)(3), Board precedent and practice, or labor policy.

The "never represent" interpretation would prohibit Board certification *and* voluntary recognition of any mixed-guard/nonguard union that seeks to represent guards. This interpretation is most consistent with the reasons that Congress imposed the "union membership" restriction precluding the Board from certifying a mixed-guard/nonguard union. Not only did Congress disfavor having any mixed *bargaining units* consisting of guards and nonguards together (Sec. 9(b)(3)'s "unit" restriction),

[1] 270 NLRB 787 (1984), affd. sub nom. *Truck Drivers Local 807 v. NLRB*, 755 F.2d 5 (2d Cir. 1985).

[2] Sec. 9(b)(3).

Congress believed that a *union* that admitted both guards and nonguards to "membership" would generate conflicting loyalties contrary to the public interest.[3] However, Section 9(b)(3) expressly states only that such a union shall not be "certified" as the representative. The literal language of Section 9(b)(3) does not prohibit voluntary recognition of a mixed guard/nonguard union as the representative of a unit of guards, which might suggest Congress did not intend to restrict voluntary recognition.[4] Further, the Board and the courts have not embraced the "never represent" interpretation. Rather, the Board and the courts have interpreted Section 9(b)(3) to permit voluntary employer recognition of a mixed-guard/nonguard union as the representative of a guards-only bargaining unit.[5]

The "voluntary relationship" interpretation—adopted by the Board and the Court of Appeals for the Second Circuit in *Wells Fargo*—has been the prevailing interpretation of Section 9(b)(3)'s "union membership" restriction for the past 30 years. This interpretation recognizes an employer's right to extend voluntary recognition to a mixed-guard/nonguard union that seeks to represent a unit of guards, and also the right of either party to end that voluntary relationship after any collective-bargaining agreement expires. As my colleagues emphasize, this interpretation is less protective of the Board's interest in fostering stable bargaining relationships than the "voluntary recognition/conversion" interpretation. But it is consistent with the reasons that prompted Congress to adopt the "union membership" restriction in Section 9(b)(3) in the first place. By making the continuation of the parties' relationship voluntary following contract expiration, the "voluntary relationship" interpretation adopted in *Wells Fargo* promotes Congress' purpose to avoid "the potential conflict of loyalties arising from the guard union's representation of nonguard employees or its affiliation with other unions who represent nonguard employees."[6] In *Wells Fargo*, the Board recognized that Section 9(b)(3) only expressly prohibits certification of a mixed guard/nonguard union as the representative of a guards unit. However, as the *Wells Fargo* majority stated, the "potential conflict of loyalties exists whether a mixed guard union is certified or not." The Board continued:

> Viewed in this light, there is no basis for the Board's drawing a distinction between initial certification and, as here, the compulsory maintenance of a bargaining relationship through the use of a bargaining order. In either case, saddling the employer with an obligation to bargain presents it with the same set of difficulties and the same potential conflict of loyalties that Section 9(b)(3) was designed to avoid.[7]

Thus, the Board reasonably held that voluntary recognition must remain voluntary and therefore subject to withdrawal when the contract expires.

The third option, the "voluntary recognition/conversion" interpretation, is adopted today by my colleagues in the majority. This interpretation is supported by the literal wording of Section 9(b)(3), which only expressly proscribes having a mixed guard/nonguard union "certified," and it furthers the Board's interest in fostering stable bargaining relationships by preventing employers from withdrawing recognition after contract expiration where the union continues to enjoy majority support. Moreover, the "uncertifiable" restriction of Section 9(b)(3) does have some negative consequences, which gives some effect to Congress' disapproval of mixed guard/nonguard unions. For example, when a union is certified following an election, a 12-month "election bar" protects the union from a decertification or rival union election,[8] and a 12-month "certification bar" precludes the processing of election petitions and gives the union an irrebuttable presumption of majority support (which means the employer cannot withdraw recognition even when there is objective evidence that the union lacks majority support).[9] These safeguards are unavailable to an uncertifiable mixed guard/nonguard

[3] See fns. 15 and 21, infra, and accompanying text.

[4] Indeed, the very next section in the Act—Sec. 9(c)(1)(A)—was also added to the Act as part of the Taft-Hartley amendments in 1947, and it expressly refers to a union that "has been certified or is being currently recognized by [the] employer." This language reinforces the view that if Congress in Sec. 9(b)(3) intended to prevent mixed guard/nonguard unions from being either "certified" *or* "recognized," it was aware of the distinction and would have prohibited both.

[5] See, e.g., *White Superior Division,* 162 NLRB 1496, 1499 (1967), enfd. in relevant part 404 F.2d 1100 (6th Cir. 1968); *Wells Fargo*, 270 NLRB at 787.

[6] *Wells Fargo*, 270 NLRB at 789. The majority speculates that an employer who chooses to voluntarily recognize a mixed-guard/nonguard union "may conclude that the potential conflict that concerned Congress either is not present or is outweighed by the potential advantages of entering into a collective-bargaining relationship with a mixed-guard union." Although this *may* be so, we cannot conclude it is so, since current law under *Wells Fargo* allows such an employer to withdraw recognition upon contract expiration if a conflict in fact exists or develops.

[7] Id. (fn. omitted).

[8] See Sec. 9(c)(3) ("No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.").

[9] See *Brooks v. NLRB*, 348 U.S. 96 (1954); *Midstate Telephone Co.*, 179 NLRB 83 (1969). See also *General Service Employees Union, Local 73 v. NLRB*, 230 F.3d 909, 914–915 (7th Cir. 2000) (recognizing that differences exist between the treatment afforded under the Act to certified and voluntarily recognized unions, respectively).

union that has been voluntarily recognized as the representative of a guards unit.

In my view, however, the relatively minor disadvantages of uncertifiability[10] do not adequately reflect Congress' concern about the potential conflicts where mixed unions represent guards. The Act's legislative history shows that Congress adopted Section 9(b)(3) to repudiate *NLRB v. Jones & Laughlin Steel Corp.*,[11] where a union "sought to be *certified* as the collective bargaining representative of the guard force," even though "the same union . . . represented the production and maintenance employees."[12] The Supreme Court, in a 5–4 decision, upheld the Board's certification of the union, contrary to a Sixth Circuit decision that rejected the Board's certification based on the risk that where a union represents both "plant protection employees" and "fellow workers," the guards might "find themselves in conflict with other members of their Union."[13] Senator Taft—the legislation's principal sponsor in the Senate—explained that Section 9(b)(3) was added by the Conference Committee to accommodate the House (which would have excluded guards altogether from "employee" status under the Act)[14] and to embrace the Sixth Circuit's view in *Jones & Laughlin*, which the Supreme Court had rejected:

> Section 9(b) is also the same as section 9(b) of the Senate amendment with the exception of an addition of a third clause relating to plant guards. As has been previously stated, the Senate rejected a provision in the House bill which would have excluded plant guards as employees protected by the act. The conferees on both sides, however, have been impressed with the reasoning of the Circuit Court of Appeals for the sixth circuit in the *Jones and Laughlin* case in which an order of the Board certifying as a bargaining representative of guards, the same union representing the production employees was set aside. Although this case was recently reversed by the Supreme Court on the ground that the Board had it within its power to make such a holding, four of the Justices agreed with the Circuit Court of Appeals holding that this was an abuse of the discretion permitted to the Board under the act. One of the dissenters of the Board has also expressed this view in a number of dissenting opinions. Under the language of clause (3), guards still retain their rights as employees under the National Labor Relations Act, but the Board is instructed not to place them in the same bargaining unit with other employees, *or to certify as bargaining representatives for the guards a union*

[10] In important ways, the effects of certification and voluntary recognition are virtually indistinguishable. Under *Keller Plastics*, 157 NLRB 583 (1966), an employer that has voluntarily recognized a union is precluded from withdrawing recognition for a "reasonable" period of time. Moreover, the duration of this "reasonable" period may be just about the same as the 1-year duration of the prohibition against withdrawal of recognition following certification. See *MGM Grand Hotel*, 329 NLRB 464 (1999) (finding that a "reasonable" period for bargaining had not yet elapsed 356 days after voluntary recognition). In addition, under the Board's "recognition bar" doctrine, voluntary recognition bars the processing of an election petition for (again) a "reasonable" period of time. *Lamons Gasket Co.*, 357 NLRB 739 (2011). This "reasonable" period continues for up to a year and is measured not from the date recognition is extended, but from the date of the parties' first collective-bargaining meeting, even if the parties do not have their first meeting until *months* after the date of voluntary recognition. *Americold Logistics, LLC*, 362 NLRB No. 58, slip op. at 3 (2015). Because it does not begin to run until the parties' first bargaining session, the "reasonable" period during which election petitions are barred following voluntary recognition may easily *exceed* the 12-month "certification bar" period. For my views concerning these and related matters, see my dissenting opinion in *Americold Logistics*, 362 NLRB No. 58, slip op. at 6–13.

[11] 331 U.S. 416 (1947), reversing 146 F.2d 718 (6th Cir. 1945). The Sixth Circuit's decision denied enforcement to 53 NLRB 1046 (1943). In other words, the Supreme Court upheld the Board's decision.

[12] 331 U.S. at 418, 420 (emphasis added).

[13] 146 F.2d at 722–723.

[14] The House versions of the Taft-Hartley Act, also known as the Labor Management Relations Act, excluded from the Act's definition of "employee" "any individual employed as a supervisor," and "supervisor" was defined to include any individual "who is employed in . . . police . . . matters." See, e.g., H.R. 3020, 80th Cong. § 101 (1947), amending NLRA §§ 2(3), 2(12)(B), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT OF 1947 (hereinafter "LMRA Hist."), at 34, 41 (House bill as reported); H.R. 3020, 80th Cong. § 101 (1947), amending NLRA §§ 2(3), 2(12)(B), reprinted in 1 LMRA Hist. 161, 168 (House bill as passed in the House). The Conference Committee abandoned this approach and, instead, adopted the restrictions contained in Section 9(b)(3). See, e.g., H.R. Rep. 80–510, at 9 (1947), reprinted in 1 LMRA Hist. at 513 (amending NLRA § 9(b)(3)) (Conference Report); id. at 35–36, reprinted in 1 LMRA Hist. 539–540 ("In the case of guards, the conference agreement does not permit the certification of a labor organization as the bargaining representative of guards if it admits to membership, or is affiliated with any organization that admits to membership, employees other than guards."); id. at 47–48, reprinted in 1 LMRA Hist. 551–552 ("Under [the House bill] definition individuals employed for police duties came within the definition of 'supervisor.' The conference agreement represents a compromise on this matter. . . . It is . . . provided that no labor organization can be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards."). See also *Truck Drivers Local 807 v. NLRB*, 755 F.2d 5, 8–10 (2d Cir. 1985).

Unfortunately, the fact that Congress in 1947 elected to preserve the Act's protection for "guards"—abandoning the House proposal to exclude guards from the protection of the Act altogether—provides no guidance regarding the questions raised in the instant case because the treatment of guards as "employees" under the Act is equally compatible with all three interpretations of Sec. 9(b)(3) set forth in the text. However, the legislative history regarding the Taft-Hartley amendments suggests Congress intended to apply the restrictions in Sec. 9(b)(3) equally to Board certification and voluntary recognition. See fn. 21, infra.

> *which admits other employees to membership or is affiliated directly or indirectly with labor organizations admitting employees other than guards to membership.*[15]

In short, because *Jones & Laughlin* happened to deal with a "certified" guard/nonguard union, and because Section 9(b)(3) was adopted to repudiate *Jones & Laughlin*, it is plausible that this explains the presence of the word "certified" in Section 9(b)(3), even though Congress may have intended to prohibit more generally the representation of guards by mixed guard/nonguard unions.[1615] If Congress deemed it objectionable to have guards represented by "certified" mixed guard/nonguard unions, such an arrangement would appear equally objectionable when provided by a mixed guard/nonguard union that received voluntary recognition. As the Second Circuit reasoned in its decision upholding the Board's *Wells Fargo* decision:

> The fact that Congress expressly precluded the Board from certifying a mixed guard union as the representative of a unit of guards . . . is certainly evidence that Congress disfavored such relationships. Moreover, it is reasonable to infer from the statutory language and the decisions under it that the preclusion of certification portends more than merely a simple check on the Board's power to certify the results of an election. . . .
>
> We are convinced that, based on the language and legislative history of Section 9(b)(3), the Board was warranted in interpreting the section as proscribing Board direction to an employer to bargain with a mixed guard union despite prior voluntary recognition of that union by the employer. There is sufficient support for the Board's conclusion that in enacting the statute, Congress knowingly decreased the stability of bargaining relationships in order to further its objective of protecting employers from the potential for divided loyalty. In view of this, *we find no reasoned basis for a distinction between initial certification and compulsory maintenance of a voluntary relationship. A voluntary grant of recognition cannot change the substance of Section 9(b)(3)*.[17]

My colleagues and I agree that the Board in *Wells Fargo* engaged in a difficult balancing of competing considerations. On the one hand, although the holding of *Wells Fargo* extends beyond the express language in the statute, the Board's interpretation in that case gives effect to the purposes underlying Section 9(b)(3)'s "membership" restriction.[18] On the other, although the rationale underlying Section 9(b)(3)—to avoid the potential for a conflict of loyalties if a union that admits both guards and nonguards to membership were permitted to represent a unit of guards—disfavors *any* representation of guards by mixed-guard/nonguard unions, the Board has long permitted employers to extend voluntary recognition to mixed-guard/nonguard unions. And once an employer voluntarily recognizes a mixed-guard/nonguard union, it does weaken labor relations stability to permit employers to abandon the bargaining relationship after the collective-bargaining agreement expires.[19] Finally, there is no question that unions in recent years have experienced significant pressure to consolidate their operations, resulting in a substantial number of union mergers and the need for unions to pursue available options to increase their representation of employees, without regard to whether those employees are guards or nonguards.[20] All of these factors must be considered.

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[15] 93 Cong. Rec.6601 (1947), reprinted in 2 LMRA Hist. 1541 (statement of Sen. Taft) (emphasis added). During debates in the Senate, Senator Murray, in opposition to Sec. 9(b)(3), stated that the restrictions on mixed guard/nonguard unions was a "petulant gesture" directed at the Supreme Court, to which Senator Taft responded that "the Supreme Court's opinion to which the Senator has referred was only a 5-to-4 opinion, and the dissenting opinion was about as good as the majority opinion." 93 Cong. Rec. 6658 (June 6, 1947), reprinted in 2 LMRA Hist. 1572 (statements of Sen. Murray and Sen. Taft). See also *Truck Drivers Local 807 v. NLRB*, supra, 755 F.2d at 8-10; *Teamsters Local 71 v. NLRB*, 553 F.2d 1368, 1373 fn. 9 (D.C. Cir. 1977). As the Second Circuit noted in *Truck Drivers*, Board Member Reynolds was the author of the "dissenting opinions" regarding the representation of guards by mixed guard/nonguard unions that Senator Taft referenced with approval. *Truck Drivers Local 807*, 755 F.2d at 8 ("[T]he conference was impressed by the dissenting views of Board Member Reynolds in such cases as *Monsanto Chemical Co*., 71 N.L.R.B. 11 (1946), wherein he argued that the Board has a duty to decline the use of its processes in order to avoid encouraging the creation of relationships which are incompatible with the Act and are inherently unsound labor practices.").

[16] The Second Circuit in *Truck Drivers Local 807 v. NLRB* expressed the same view, explaining the reference to a "certified" union in Section 9(b)(3) on the basis that "Congress may have focused primarily on the particular situation in *Jones & Laughlin*." 755 F.2d at 9. Cf. *Teamsters Local 71 v. NLRB*, supra.

[17] *Truck Drivers Local 807 v. NLRB*, 755 F.2d at 9–10 (fn. and citations omitted; emphasis added).

[18] See fn. 21 infra.

[19] See, e.g., *NLRB v. Appleton Electric Co.*, 296 F.2d 202, 206 (7th Cir. 1961) (a "basic policy of the Act [is] to achieve stability of labor relations"); *Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. 355, 362–363 (1949) ("To achieve stability of labor relations was the primary objective of Congress in enacting the National Labor Relations ct.").

[20] See, e.g., J. Pencavel, "The Changing Size Distribution of U.S. Trade Unions and Its Description by Pareto's Distribution," 67 INDUS. & LAB. REL. REV. 138 (2014); G. Chaison, *Union Mergers and Union Revival: Are We Asking Too Much or Too Little?* REKINDLING THE MOVEMENT: LABOR'S QUEST FOR RELEVANCE IN THE 21ST CENTURY (Lowell Turner et al. eds., 2001).

In my view, among the competing interpretations, the Board's decision in *Wells Fargo* and the Second Circuit's decision enforcing it apply Section 9(b)(3) in the most appropriate manner. Separate from 9(b)(3)'s prohibition against mixed-guard/nonguard bargaining *units*, Congress also made the choice to adopt restrictions on mixed guard/nonguard *unions*, and there is no evidence that Congress focused narrowly on technical details regarding Board certification as opposed to voluntary recognition. Senator Taft, the principal sponsor of the Taft-Hartley amendments in the Senate, described Section 9(b)(3) in terms that did not differentiate between certified and voluntarily recognized guard/nonguard unions.[21] Furthermore, the Board in other contexts has held that certain bargaining relationships are voluntary and may be abandoned when the labor contract expires. Thus, under Section 8(f), which permits construction industry unions and employers to enter into pre-hire agreements, the Board likewise recognizes that, upon expiration of the parties' agreement, the union "enjoys no presumption of majority status . . . and *cannot picket or strike to compel renewal of an expired agreement or require bargaining for a successor agreement*."[22] Moreover, the Board's interpretation of Section 9(b)(3) in *Wells Fargo* has been the prevailing interpretation of that statutory provision for more than 30 years, and as noted at the outset of this opinion, I believe we lack compelling reasons to reconsider *Wells Fargo*.

For these reasons, I respectfully dissent in the instant case. I would adhere to the approach set forth in *Wells Fargo* and dismiss the complaint.

Dated, Washington, D.C. June 9, 2106

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

Gabriela Teodorescu Alvaro, Esq., for the General Counsel.
Theodora Lee, Esq. and *Michael G. Pedhirney, Esq.,* for the Respondent.
Andrew H. Baker, Esq., for the Charging Parties.

[21] When describing the Conference Committee's addition of Sec. 9(b)(3) to the legislation, Senator Taft stated that "as to plant guards we provided that they could have the protection of the Wagner Act only if they had a union separate and apart from the union of the general employees." 93 Cong. Rec. 6603 (June 5, 1947), reprinted in 2 LMRA Hist. 1544 (statement of Sen. Taft). See also *Truck Drivers Local 807 v. NLRB*, 755 F.2d at 9.

[22] *John Deklewa & Sons*, 282 NLRB 1375, 1387 (1987) (emphasis added), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988).

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. On August 16, 2010, Teamsters Local Union No. 439, Teamsters Local Union No. 315 and Teamsters Local Union No. 853 (Local Unions 439, 315, and 853) filed the charge in Case 32–CA–025316 against Loomis Armored US, Inc. (Respondent or the Employer). On March 7, 2011, Local 439, Local 315, and Local 853 filed an amended charge against Respondent. On February 23, 2011, Teamsters Local 150 (Local 150) filed a charge against Respondent in Case 32–CA–025708. On January 20, 2011, Teamsters Local 542 (Local 542) filed a charge against Respondent Local 542 filed an amended charge on March 8, 2011. On January 20, Teamsters Local 396 (Local 396) filed a charge against Respondent. Local 396 filed an amended charge on March 10, 2011. On March 18, 2011, the Regional Director for Region 32 of the National Labor Relations Board (the Board) issued a complaint against Respondent in Case 32–CA–025316. The complaint alleges that Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by withdrawing recognition from Local 430 as the collective-bargaining representative of Respondent's employees at its Stockton, California facility. The Respondent filed a timely answer in which it denied that it had violated the Act. On April 14, 2011, the Regional Director issued an amendment to the complaint. On April 7, 2011, the Regional Director for Region 20 issued a complaint against Respondent in Case 20–CA–035433 (now Case 32–CA–025708). On March 25, 2011, the Regional Director for Region 21 issued a complaint in Case 21-CA-39651 (now Case 32–CA–025709). On May 10, 2011, the Regional Director for Region 31 issued a complaint against Respondent in Case 31–CA–030093 (now Case 32–CA–025727). On June 3, 2011, the Regional Director for Region 32 issued an order consolidating the four cases for trial. On October 7, 2011, before the scheduled hearing in this case commenced, the parties jointly waived a hearing and agreed to have the case decided based on a stipulated record.

Based on the stipulated record submitted by the parties, and after considering the briefs, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

I. JURISDICTION

At all times material, Respondent a Delaware corporation with headquarters in Houston, Texas, has been providing nationwide cash handling services, including secure transfer by armored vehicle, cash processing, and outsourced vault service at various locations in California. During the 12 months prior to the issuance of the complaint, Respondent sold and shipped goods or provided services valued in excess of $50,000 directly to customers located outside the State of California.

Accordingly, the parties stipulated and I find, Respondent is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act.

The parties stipulated that Local 439, Local 315, Local 853, Local 150, Local 542, and Local 396 are labor organizations within the meaning of Section 2(5) of the Act.

II. FACTS

Since at least 1990, Local 439 has been the exclusive collective-bargaining representative of a unit of Respondent's employees in Stockton, California. The most recent collective-bargaining agreement between the parties is effective by its terms from April 1, 2009, to March 31, 2010. The bargaining unit covered by the agreement is:

> All full-time and regular part-time custodians, drivers and guards; excluding all other employees, office clerical employees, vault employees, mechanics, turret guards, and supervisory employees as defined in the Act.

The employees in the bargaining unit are all guards within the meaning of Section 9 (b)(3)of the Act.

From July 1, 2008, to September 30, 2010, Local 315 was recognized as the exclusive bargaining representative of Respondent's employees at Richmond, California, in the following unit:

> All full-time and regular part-time custodians, drivers, and guards; excluding all other employees, office clerical employees, watchmen, and supervisory employees as defined in the Act.

The employees in the bargaining unit are all guards within the meaning of Section 9(b)(3) of the Act.

From February 1, 2008, to September 30, 2010, Local 853 was the exclusive collective-bargaining representative at Milpitas, California, for the following unit:

> All full-time and regular part-time custodians, drivers, and guards; excluding all other employees, office clerical employees as defined in the Act.

The employees in the bargaining unit are all guards within the meaning of the Act.

Local 439, Local 315 and Local 853 all admit into membership guards and nonguards.

On July 27, 2010, Respondent withdrew recognition of Local 439 as the exclusive collective-bargaining representative of the employees in the Stockton unit. Respondent withdrew recognition based on Board precedent that permits withdrawal of recognition of a labor organization that represents both guards and nonguards upon the expiration of the relevant collective-bargaining agreement.

On July 26, 2010, Respondent withdrew recognition, effective September 30, 2010, of Local 315, as the exclusive bargaining representative of the employees in the Richmond unit. Respondent withdrew recognition based on Board precedent that permits withdrawal of recognition of a labor organization that represents both guards and nonguards upon the expiration of the relevant collective-bargaining agreement.

On July 26, 2010, Respondent withdrew recognition, effective September 30, 2010, of Local 853 as the exclusive bargaining representative of the employees in the Milpitas unit. Respondent withdrew recognition based on Board precedent that permits withdrawal of recognition of a labor organization that represents both guards and nonguards upon the expiration of the relevant collective-bargaining agreement.

Since at least 1965, Local 150 the Union has been the exclusive collective-bargaining representative of a unit of Respondent's employees in Sacramento, California. The most recent collective-bargaining agreement between the parties is effective by its terms from December 1, 2006, to November 30, 2010. The bargaining unit covered by the agreement is:

> All full-time and regular part-time employees employed by Respondent out of its Sacramento facility as custodians, drivers and guards; excluding all other employees, office and clerical employees , watchmen, and supervisory employees as defined in the Act.

The employees in the bargaining unit are all guards within the meaning of Section 9(b)(3) of the Act.

On September 27 2010, Respondent withdrew recognition, effective November 30, 2010, of Local 150 as the exclusive bargaining representative of the employees in the Sacramento Unit. Respondent withdrew recognition based on Board precedent that permits withdrawal of recognition of a labor organization that represents both guards and nonguards upon the expiration of the relevant collective-bargaining agreement.

Since at least 1963, Local 542 has been the exclusive collective-bargaining representative of a unit of Respondent's employees in San Diego, California. The most recent collective-bargaining agreement between the parties is effective by its terms from March 1, 2010, to February 28, 2011. The bargaining unit covered by the agreement is:

> All full-time and regular part-time employees employed by Respondent out of its San Diego branch as custodians, drivers and guards; excluding all other employees, vault employees, turret employees, office clerical employees , professional employees and supervisors as defined in the Act.

The employees in the bargaining unit are all guards within the meaning of Section 9 (b)(3)of the Act.

On December 20, 2010, Respondent withdrew recognition, effective February 28, 2011, of Local 542 as the exclusive bargaining representative of the employees in the San Diego unit. Respondent withdrew recognition based on Board precedent that permits withdrawal of recognition of a labor organization that represents both guards and nonguards upon the expiration of the relevant collective-bargaining agreement.

Since at least 1981, Local 396 has been the exclusive collective-bargaining representative of a unit of Respondent's employees in Los Angeles, California. The most recent collective-bargaining agreement between the parties is effective by its terms from February 1, 2010, to January 31, 2011. The bargaining unit covered by the agreement is:

> All regular full-time and part-time custodians, drivers, guards and vault employees working out of the Respondent's City of Los Angeles, California (Pico) branch.

The employees in the bargaining unit are all guards within the meaning of Section 9 b)(3)of the Act.

On November 23, 2010, Respondent withdrew recognition, effective January 31, 2011, of Local 396 as the exclusive bargaining representative of the employees in the Los Angeles unit. Respondent withdrew recognition based on Board precedent that permits withdrawal of recognition of a labor organiza-

tion that represents both guards and nonguards upon the expiration of the relevant collective-bargaining agreement.

Local 150, Local 542 and Local 396 all admit into membership guards and nonguards.

Statement of the Issue Presented

The legal issue presented is whether an employer that has voluntarily recognized a labor organization that represents both guards and nonguards as the designated exclusive collective-bargaining representative of a unit of the employer's guards, violates Section 8(a)(5) when it withdraws recognition upon expiration of the collective-bargaining agreement because that labor organization is a mixed-guard labor organization that is not certifiable by the Board under Section 9(b)(3) of the Act.

III. ANALYSIS

Section 9(b)(3) of the Act provides in relevant part that "no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership . . . . employees other than guards. Even though the Board may not certify a mixed-guard union as the bargaining representative of a unit comprised of guards, an employer may voluntarily recognize a mixed-guard union as a bargaining representative of guards and enter into a collective-bargaining agreement applicable to those guards. See, e.g., *Northwest Protective Service,* 342 NLRB 1201, 1202–1203 (2004).

In *Wells Fargo Corp.,* 270 NLRB 787 (1984), the Board held that an employer has the right to unilaterally end its voluntary recognition of the mixed-guard union upon the expiration of the collective-bargaining agreement. The Board held:

> There is no basis for the Board drawing a distinction between initial certification and, as here, the compulsory maintenance of a bargaining relationship through the use of a bargaining order. In either case, saddling the employer with an obligation to bargain presents it with the same set of difficulties and the same potential conflict of loyalties that Section 9(b)(3) was designed to avoid. At 789.

In *Temple Security Inc.,* 328 NLRB 663 (1999), the General Counsel argued that the Board should reverse its *Wells Fargo* decision. However, the Board held in reliance on *Wells Fargo,* that the employer acted lawfully when on the termination of the collective-bargaining agreement, it withdrew recognition of a mixed-guard union.

In the instant case, the General Counsel and the Charging Parties, urge that I (and ultimately the Board) reverse the *Wells Fargo* rule. That argument must be made to the Board. I am bound by current Board law. Accordingly, I recommend dismissal of the complaints.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Unions are labor organizations within the meaning of Section 2(5) of the Act.

3. The Respondent has not engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) of the Act.

On the foregoing findings of fact and conclusions of law, and on the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended.[1]

ORDER

The complaints are dismissed in their entirety.

Dated, January 11, 2012

[1] All motions inconsistent with this recommended order are hereby denied. In the event no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.